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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF DELAWARE
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11 ARBUTUS BIOPHARMA) **Case No.: 22-cv-00252-MSG**
12 CORPORATION AND GENEVANT)
13 SCIENCES GMBH,)
14 Plaintiffs,) **NOTICE OF MOTION AND**
15 MODERNA, INC. and MODERNATX,) **MOTION FOR CLASS**
16 INC.) **CERTIFICATION**
17 Defendants.)
18)
19 EMANUEL MCCRAY, *On Behalf of*)
20 *Himself and All Others Similarly Situated,*)
21 Intervenors-Plaintiffs.)
22)

23 To Plaintiffs Arbutus Biopharma Corporation and Genevant Sciences GmbH
24 and their attorneys of record, to Defendants Moderna, Inc. and ModernaTx, Inc. and
25 their attorneys of record, and to the United States and its attorneys of record,
26 PLEASE TAKE NOTICE that on _____, 2023, at _____ in the Courtroom
27
28

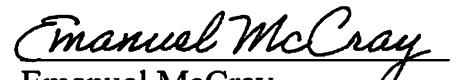
1 of the presiding judge in this case in the Federal Courthouse in Fort Worth, Texas,
2 or as soon thereafter as Plaintiffs-Intervenors may be heard, Plaintiffs-Intervenors
3 will and do hereby move the Court for an order certifying this case as a class action
4 pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure on behalf of
5 the following class of similarly situated persons:
6

7 8 All persons born or naturalized in the United States who are citizens of
8 the United States, and subject to the jurisdiction of the United States.
9

10 11 This motion is based upon the accompanying memorandum of law and upon
11 all other matters of record herein. In accordance with Local Rule 7.1.1, a
12 conference was not. The last action on the Docket occurred on February 22, 2023,
13 (Doc. 55), granting Motion for Pro Hac Vice Appearance of Attorney Nancy Kaye
14 Horstman.

16 17 Dated: February 26, 2023

18 Respectfully submitted,

19 20 
21 Emanuel McCray
22 2700 Caples Street
23 P.O. Box 3134
24 Vancouver, WA 98668
25 (564) 208-7576
26 emanuel.mccray@hotmail.com
27
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1 TABLE OF CONTENTS

2	TABLE OF CONTENTS.....	i
3		
4	TABLE OF AUTHORITIES.....	ii
5		
6	INTRODUCTION	1
7		
8	ARGUMENT	
9		
10	I. THE PROPOSED CLASS MEETS RULE 23.....	1
11		
12	CONCLUSION.....	5
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Cases	Page(s)
Bond v. U.S. 564 U.S. 211, 222 (2011)	1, 5
Califano v. Yamasaki 442 U.S. 682, 700-701 (1979)	1, 2
Gen. Tel. Co. of Sw. v. Falcon 457 U.S. 147, 155, 161 (1982)	2
In re Hydrogen Peroxide Antitrust Litig. 552 F.3d 305, 309-310 (3d Cir. 2008)	2, 4
Lanner v. Wimmer 662 F.2d 1349, 1357 (10th Cir. 1981)	5
Leisner v. New York Telephone Co. 358 F. Supp. 359, 372 (S.D.N.Y. 1973)	5
Rice v. City of Philadelphia 66 F.R.D. 17, 20 (E.D. Pa. 1974)	2
United States Fidelity Guaranty Co. v. Lord 585 F.2d 860, 873 (8th Cir. 1978)	5
Statutes	
Federal Rules of Civil Procedure	
Rule 23	3
Rule 23(a)	5
Rule 23(a)(1)	3
Rule 23(a)(3)	3, 4
Rule 23(b)(3)	6

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

I. THE PROPOSED CLASS MEETS RULE 23.

A. General.

The proposed Complaint is incorporated herein as if repeated here.

In *Bond v. U.S.*, 564 U.S. 211, 222 (2011), the Supreme Court stated that:

“Fidelity to principles of federalism is not for the States alone to vindicate. The recognition of an injured person’s standing to object to a violation of a constitutional principle that allocates power within government is illustrated, in an analogous context, by cases in which individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations. Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution’s concern. The structural principles secured by the separation of powers protect the individual as well.”

In *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979), the Supreme Court

held that:

“[C]lass relief is appropriate in civil actions brought in federal court, including those seeking to overturn determinations of the departments of the Executive Branch of the Government in cases where judicial review of such determinations is authorized.... Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them. (Citations omitted.) Where the district court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding.”

1 A class action may be established if (1) the class is so numerous that joinder
2 of all members is impracticable, (2) there are common questions of law or fact
3 concerning the class, (3) the claims or defenses of the representative parties are
4 typical of the claims or defenses of the class, *and* (4) the interests of the class will
5 be fairly and adequately protected by the representative parties. *In re Hydrogen*
6 *Peroxide Antitrust Litig.*, 552 F.3d 305, 309-310 (3d Cir. 2008), citing *Gen. Tel. Co.*
7 *of Sw. v. Falcon*, 457 U.S. 147, 155, 161 (quoting *Califano v. Yamasaki*, 442 U.S.
8 682, 700-01 (1979)).

9
10 “*The trial court, well-positioned to decide which facts and legal arguments*
11 *are most important to each Rule 23 requirement, possesses broad discretion to*
12 *control proceedings and frame issues for consideration under Rule 23.*” *Id.* 552 F.3d
13 *at 310.*

14
15 “*Defining a class as consisting of all persons who have been or will be*
16 *affected by the conduct charged to the defendants is entirely appropriate where only*
17 *injunctive or declaratory relief is sought.*” *Rice v. City of Philadelphia*, 66 F.R.D.
18 17, 20 (E.D. Pa. 1974).

19
20 The proposed class is clear and is defined by whether Moderna and the
21 United States may constitutionally shift Moderna’s liabilities for its COVID-19
22 “prototype pathogen” vaccines to the United States in violation of the principles of
23 federalism and the separation of powers doctrine.

1 Moreover, the existing parties cannot adequately protect the “powers”
2 reserved to the People of the United States in the Tenth Amendment without their
3 assistance.
4

5 **B. Numerosity and Impracticality of Joinder**

6 The proposed class satisfies Rule 23(a)(1) because the class size is
7 approximately 334,000,000 individuals and is “so numerous that joinder is
8 impractical.” Thus, the proposed class plainly satisfies the numerosity requirement
9 of Rule 23(a).

10 **C. Common Questions of Law or Fact**

11 All putative class members have the same rights guaranteed under the Federal
12 Constitution and certain “powers” reserved to them under the Tenth Amendment. A
13 sole discreet legal question all putative Plaintiffs-Intervenors share in common with
14 the existing Plaintiffs is may constitutionally shift Moderna’s liabilities for its
15 COVID-19 “prototype pathogen” vaccines to the United States in violation of the
16 principles of federalism and the separation of powers doctrine.

17 **D. Typicality of Claims.**

18 Rule 23(a)(3) requires that the claims be “typical of the claims ... of the
19 class.” The loss of constitutional sovereignty and powers reserved to the People of
20 the United States is typical of the putative class. Because McCray is a citizen of the
21 United States and is among the “people” to whom the Tenth Amendment reserves
22

1 “powers not delegated to the United States by the Constitution, nor prohibited by it
2 to the States”, McCray has Article III standing to pursue declaratory relief under the
3 typicality requirements of Rule 23 and this Court has already pointed to the
4 difficulties Moderna and the United States face in their efforts to shift Moderna’s
5 liabilities to the United States.

6
7 Certification under Rule 23(b)(3), which is permissible when the court “finds
8 that the questions of law or fact common to class members predominate over any
9 questions affecting only individual members, and that a class action is superior to
10 other available methods for fairly and efficiently adjudicating the controversy.”
11
12 (Citation omitted.) The twin requirements of Rule 23(b)(3) are known as
13 predominance and superiority. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at
14 310.
15
16

17 “Predominance ‘tests whether proposed classes are sufficiently cohesive to
18 warrant adjudication by representation.... Issues common to the class must
19 predominate.... [A] district court must formulate some prediction as to how specific
20 issues will play out in order to determine whether common or individual issues
21 predominate in a given case....’” *Id.* 552 F.3d at 310-11.
22
23

24 In this case, McCray and the proposed class members’ legal and remedial
25 theories predominate and are exactly the same. The predominance, superiority and
26 typicality requirement of Rule 23(a)(3) are therefore satisfied.
27
28

E. Adequacy of Representation.

The final requirement for class certification, set out in Rule 23(a)(4), is that the named plaintiffs “will fairly and adequately protect the interest of the class.”

McCray is a citizen of the United States. The Federal Constitution applies equally to each citizen of the United States. See *Bond*, 564 U.S. at 222 (2011): “Fidelity to principles of federalism is not for the States alone to vindicate.... The structural principles secured by the separation of powers protect the individual as well.” There are no formal or personal conflicts of interests between McCray, the putative class members, and the single claim for declaratory relief which McCray seeks to pursue.

Moreover, “[i]t is not ‘fatal if some members of the class might prefer not to have violations of their rights remedied.’” *Lanner v. Wimmer*, 662 F.2d 1349, 1357 (10th Cir. 1981), citing *United States Fidelity Guaranty Co. v. Lord*, 585 F.2d 860, 873 (8th Cir. 1978) (quoting *Leisner v. New York Telephone Co.*, 358 F. Supp. 359, 372 (S.D.N.Y. 1973)), *cert. denied*, 440 U.S. 913, 99 S.Ct. 1228, 59 L.Ed.2d 462 (1979). Whether McCray will adequately represent the class is a question of fact to be ‘raised and resolved in the trial court in the usual manner.

II. CONCLUSION

For the foregoing reasons, this action for declaratory relief should be certified as a class action pursuant to Fed.R.Civ.Proc., Rule 23(a) and (b).

1 Respectfully submitted this 26th day of February
2 2023.

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4 Emanuel McCray
5 2700 Caples Street
6 P.O. Box 3134
7 Vancouver, WA 98668
(564) 208-7576
emanuel.mccray@hotmail.com

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11 ARBUTUS BIOPHARMA) **Case No.: 22-cv-00252-MSG**
12 CORPORATION AND GENEVANT)
13 SCIENCES GMBH,)
14 Plaintiffs,) **CERTIFICATE OF SERVICE**
15 MODERNA, INC. and MODERNATX,)
16 INC.)
17 Defendants.)
18)
19 EMANUEL MCCRAY, *On Behalf of*)
20 *Himself and All Others Similarly Situated,*)
21 Intervenors-Plaintiffs.)
22 _____)

23 I hereby certify that on the 26th day of February 2023, I mailed a copy of the
24 following documents,
25

26 (1) MOTION TO INTERVENE
27
28 (2) CLASS ACTION COMPLAINT FOR DECLARATORY RELIEF

1 (3) NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION,

2 with postage prepaid, to all parties addressed as follows:

4 JOHN W. SHAW 5 NATHAN ROGER HOESCHEN 6 KAREN ELIZABETH KELLER 7 Shaw Keller LLP I.M. Pei Building 1105 North Market Street 12th Floor Wilmington, DE 19801 Email: jshaw@shawkeller.com Email: nhoeschen@shawkeller.com Email: kkeller@shawkeller.com <i>Attorneys for Plaintiffs</i>	2 DAVID C. WEISS United States Attorney 1313 North Market Street PO Box 2046 Wilmington, DE 19801 <i>Attorney for the United States</i>
12 BRIAN P. EGAN 13 JACK B. BLUMENFELD 14 Morris, Nichols, Arsh & Tunnell LLP 1201 North Market Street 15 P.O. Box 1347 Wilmington, DE 19899 302-351-9454 Email: began@mnat.com Email: Jbbefiling@mnat.com <i>Attorneys for Defendants</i>	10 MICHAEL GRANSTON 11 GARY L. HAUSKEN 12 PHILIP CHARLES STERNHELL 13 HAYLEY A. DUNN 14 KAVYASRI NAGUMOTU 15 Commercial Litigation Branch 16 Civil Division 17 U.S. Department of Justice 18 950 Pennsylvania Avenue, NW 19 Washington, DC 20530-0001 Email: Gary.L.Hausken@usdoj.gov Email: Philip.C.Sternhell@usdoj.gov Email: Hayley.A.Dunn@usdoj.gov Email: Kavyasri.Nagumotu@usdoj.gov <i>Attorneys for the United States</i>

20 *Emanuel McCray*
21 Emanuel McCray

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